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Via Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*
WT Docket No. 03-66
Written Ex Parte Presentation

Dear Ms. Dortch:

BellSouth Corporation and its wholly-owned subsidiaries BellSouth Wireless Cable, Inc. and South Florida Television, Inc. (collectively, "BellSouth") submit this letter to reiterate the benefits of its proposal in the above-referenced proceeding¹ to permit certain BRS and EBS licensees to "opt out" of a market transition.

BellSouth continues to support the fundamental changes to the BRS/EBS band proposed by the industry Coalition. As previously stated, it also endorses the Coalition's plan to permit a licensee to "opt out" of a transition in certain circumstances.² Specifically, a licensee should be permitted to "opt out" if, as of October 7, 2002, it: (a) used the 2.5 GHz band to provide multichannel video programming distribution ("MVPD") service to at least five percent of the households within its GSA; or (b) was part of a system that deployed digital technology on more than seven channels.³

These narrow exceptions to the mandatory regional transition reflect industry input and simply recognize the need to balance the interests of legitimate incumbents that have made substantial investment with those of operators seeking to launch new low-power wireless services.⁴ It is significant that none of the pleadings

¹ See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 04-135, 19 FCC Rcd 14165 (2004) ("*BRS/EBS Order*").

² See BellSouth's Consolidated Opposition to Petitions for Reconsideration filed February 22, 2005 at 17-19; BellSouth's Consolidated Reply to Oppositions to Petitions for Reconsideration filed March 9, 2005 ("*BellSouth Reply*") at 11.

³ See "A Proposal for Revising the MDS and ITFS Regulatory Regime," filed October 7, 2002 by the Wireless Communications Association International, Inc., the National ITFS Association and the Catholic Television Network at Appendix B, p.17, and Supplement filed November 14, 2002 at 4-5 (collectively, "*Coalition Proposal*").

⁴ See Coalition Proposal at Appendix B, pp.16-17.

underlying the initial *BRS/EBS Order* opposed the Coalition's "opt-out" proposal. Nevertheless, the Commission rejected the self-effectuating "opt-out" criteria in favor of a case-by-case waiver process.

In its Opposition and its Reply,⁵ BellSouth joined other participants in asking the Commission to reconsider its decision to require waivers in lieu of an "opt-out" process. As noted by one of these other parties, the Commission took "a self-effectuating proposal that would reduce burdens on Commission staff and promotes certainty that will stimulate investment, and replaced it with the vagaries and discretion of a waiver process."⁶ Another petitioner observed that "[t]he Commission's decision also is hard to reconcile with its general preference for streamlined regulatory processes over case-by-case adjudications where the latter merely impose additional delay with no countervailing benefit."⁷ Petitioners also questioned the Commission's reasoning and demonstrated that the waiver process would undermine the very policy objectives the Commission intended to promote.⁸ In sum, because of the uncertainties and potential for delay inherent in a waiver process, it is likely to unfairly favor the interests of proponents over the interests of existing licensees and operators.

By contrast, the Coalition's proposal to permit a narrow class of licensees to "opt out" of a transition under specified, well-defined criteria would provide greater certainty, reduce delay in implementing transitions and better satisfy the Commission's public policy objective of facilitating "equitable" and expeditious transitions. This proposal would afford the transition proponent and the licensee a reasonable period of time – until 30 days following the commencement of the Transition Planning Period – to reach a private agreement that would accommodate their respective needs and interests. For instance, an eligible licensee could be ready to transition within a time period that is acceptable to the proponent. Or, the eligible licensee may be able to continue programming certain channels without restricting the proponent from using other channels to deploy its advanced wireless services. Swapping channels is yet another alternative. Only if this private negotiation fails could the MVPD's "opt-out" right be asserted, and the market transition could proceed without it. Significantly, under the Coalition Plan, the marketplace – not the Commission – determines how to best accommodate the parties' respective interests.

The Coalition proposal, however, proceeds under the assumption that the marketplace will function more effectively if all licensees eligible for a particular transition transition at the same time, regardless of demand and other factors. For this reason, it fails to address the rights and obligations of licensees that elect to "opt out" of a transition. To address these shortcomings, BellSouth in its Reply proposed a refinement to the Coalition's plan to allow licensees that "opt out" to subsequently initiate transitions, either during the period for filing Initiation Plans or during any "self-transition" period the Commission might adopt.¹⁰ BellSouth noted that "[t]he exercise of this right would serve to expedite transitions. Thus, a licensee that "opts out"

⁵ See BellSouth Reply at 11..

⁶ Petition for Partial Reconsideration of the BRS Rural Advocacy Group filed January 10, 2005 ("BRS Group Petition") at 7. See also Petition for Reconsideration of the Wireless Communications Association International, Inc. filed January 10, 2005 at 30-34; Petition for Reconsideration of Choice Communications, LLC filed January 10, 2005 at 3-7; Petition for Reconsideration of Central Texas Communications, Inc. filed January 10, 2005 at 7-10.

⁷ Petition for Reconsideration of W.A.T.C.H. TV Company filed January 10, 2005 at 8.

⁸ See, e.g., BRS Group Petition at 9-14 (demonstrating that each of the four reasons cited by the Commission would disrupt the transition process).

⁹ *BRS/EBS Order* at ¶72.

¹⁰ See BellSouth Reply at 12.

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but is subsequently able to transition should not be required to wait – perhaps years – for the self-transition period in order to transition” if circumstances change and the licensee is ready to transition.¹¹

There is no public policy reason to prevent a licensee from subsequently transitioning its market when circumstances permit. Such a finding would contravene the market-based approach underlying the *BRS/EBS Order* and unfairly restrain MVPDs from freely negotiating transition rights. Preventing a licensee that has “opted out” from transitioning at a later date inevitably will frustrate the Commission’s “goal of transitioning the band quickly [in a manner that] will be fair and equitable to all parties concerned.”¹² Permitting a licensee that has opted out from subsequently transitioning also would enable the market to allocate transition costs more efficiently.

Together with the Coalition’s “opt-out” plan, BellSouth believes its proposed refinement properly balances the rights of proponents with those of the narrow class of licensees eligible to “opt out,” will facilitate private agreements and will expedite transitions. By specifying in advance the criteria under which a licensee may “opt out,” proponents and licensees eligible to do so could begin to exchange information and seek ways to address their respective interests. Allowing a reasonable amount of time for parties to reach a negotiated resolution also increases the likelihood that the needs of all parties will be accommodated. And by providing a licensee with flexibility to initiate a transition after it has “opted out,” the rights of all MVPDs are more appropriately considered in the Commission’s efforts to facilitate equitable, expeditious and ubiquitous transitions.

Respectfully submitted,

Kell for Karen B. Posner

cc: Uzoma Onyeije
John Schauble

¹¹ *Id.*

¹² *BRS/EBS Order* at ¶72.